

The Laws of War in the Pre-Dawn Light: Institutions and Obligations in Thucydides' *Peloponnesian War*

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This Essay in honor of Oscar Schachter criticizes both ahistorical renderings of the law of war and realist depictions of Peloponnesian War by asking whether Thucydides describes the conditions of a law of war. Examining the history in detail, Sheppard considers whether Thucydides described a sufficient institutional structure to recognize and enforce an intermunicipal law during war, as well as concepts of jus ad bellum and jus in bello. Despite the tradition of reading Thucydides as a realist, this Essay concludes that a more accurate reading would be that Thucydides not only describes a form of a law of war but provided ample evidence of the benefits of its acceptance and the dangers of its breach.

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* Associate Professor, University of Arkansas School of Law. This Article is dedicated to the memory of Professor Oscar Schachter, whose gentle but persistent teaching was a model that has improved the lives and knowledge of my own students. My thanks to Nick Boevig, Amitabh Chibber, and the staff of the *Columbia Journal of Transnational Law* for their assistance. This Article is an elaboration of a lecture given at Downing College, Cambridge, in its summer school, in a consortium that the college sponsors with the law schools of the Universities of Mississippi, Arkansas, Tennessee, and Nebraska. I am grateful for the hospitality shown to me and our students by the college, especially by John Hopkins and Graham Virgo.

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Any reader of Thucydides' *History of the Peloponnesian War* will detect a modern ring in the reasoning and techniques used by the Greek city-states in diplomatic practices, in treaties of alliance, and in certain elementary rules of war. Disputes were sometimes submitted to arbitration. However, relations between Greeks and non-Greeks were not regulated in the same way; the latter were regarded by the Greeks as barbarians, and not as moral or legal equals.

These lines, from the casebook long associated with international law at Columbia Law School, suggest to the current generation an ancient source from which to examine the ideas that underpin the law of war.² Yet contemporary academic discussions of the law of war rarely consider the ancient world. Recent American and European studies of international law tend to give antiquity short shrift, even texts dedicated to the history of law among states.³ This is generally true of casebooks and teaching materials⁴ as well as monographs. More pertinently, studies dedicated to the history of the law of war are prone to omit the classical era.⁵ At best, despite the

1. LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* xxviii (West Publishing 4th ed. 2001).

2. The lines themselves were likely penned by Professor Friedmann, and they have been retained in each edition. See WOLFGANG FRIEDMANN ET AL., *CASES AND MATERIALS ON INTERNATIONAL LAW* 2 (West Publishing 1969). My thanks to Professor Louis Henkin for reviewing his notes in this regard.

3. Wilhelm Grewe's great achievement, *The Epochs of International Law*, commenced its study with the medieval unity of the church and the empire. WILLHELM GEORG GREWE, *THE EPOCHS OF INTERNATIONAL LAW* (Michael Byers trans., Walter de Gruyter 2d ed. 2000). In Arthur Nussbaum's classic summary, the whole of interstate relations in Asia, Greece, and Rome occupied a scant fifteen pages, despite his general interest in classical predicates to international law. Compare ARTHUR C. NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* (Macmillan 1947) [hereinafter NUSSBAUM, *HISTORY*] with Arthur Nussbaum, *The Significance of Roman Law in the History of International Law*, 100 U. PA. L. REV. 678 (1952).

4. While indeed some books—such as the new Carter, Trimble, Bradley—include a greater share of historical sources, the Columbia text quoted above remains striking in its emphasis on an historical introduction to the field. See David J. Bederman, *International Law Casebook: Tradition, Revision, and Pedagogy*, 98 AM. J. INT'L L. 200, 207 (2004) (reviewing CHRISTOPHER L. BLAKESLEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS* (Foundation Press 5th ed. 2001); BARRY E. CARTER ET AL., *INTERNATIONAL LAW* (Aspen Publishers 2003); DAMROSCH ET AL., *supra* note 1; JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* (Aspen 2002); MARK W. JANIS & JOHN E. NOYES, *CASES AND COMMENTARY ON INTERNATIONAL LAW* (West Group 2d ed. 2001).

5. Even the volumes dedicated to the law of war in Verzijl's monumental history have few references to the time before the dawn of the early modern state. See 9-11 JAN HENDRIK

now venerable instruction of Friedmann and company, Thucydides' lessons for students of the modern law of war remain under-examined.

I. HISTORY AND THE STUDY OF INTERNATIONAL LAW

We recurrently imagine international law as proceeding from a new understanding of the state following some benchmark, such as the fall of Rome, or the Peace of Westphalia, or the advent of the United Nations. The military or political affairs that either preceded this imagined horizon, or that occurred in regions of the world unaffected by the benchmark, are excluded from examination.

There are, of course, both practical and theoretical reasons to emphasize modern events in examining modern law. Practically, international lawyers must be preoccupied with the application of custom and treaties to questions of immediate concern. In such applications, our sense of the appropriate sources is often bounded by a preference for the recent. Perhaps most fundamentally, there is a sense that our times are different, that we have little or nothing to gain from looking to the past for guidance. Yet practical concerns are hardly likely to explain an academic discipline governed by theory.

Theoretically, Twentieth Century international law was dominated by positivists and statistes, whose concept of international law is limited to rules voluntarily created by states—a concept that is itself given a narrow framework of definition. Oppenheim's influential definition enshrining both concepts at the dawn of the Twentieth Century necessarily commenced with the post-Westphalian state. "International Law as a law between Sovereign and equal states based on the common consent of these States is a product of modern Christian civilization . . ."⁶ Even absent the religious veneer, Oppenheim's definition relied on the existence of the state in the modern sense, the subject of the law, to determine the existence of

WILLEM VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* (A.W. Sijthoff 1968-1998) (Vol. 9, *Inter-State Disputes and Their Settlements*, is divided between part 9a (vol. 9) *The Laws of War*, part 9b (vol. 10) *The Law of Neutrality*, and part 9c (vol. 11) *The Law of Maritime Prize*). Even so, Verzijl does note the ancient enforcement of *jus ad bellum* against Aratos, discussed *infra* note 48.

6. LASSA OPPENHEIM, *INTERNATIONAL LAW* 44 (Longmans, Green, & Co. 1905). More recent depictions of the development of international law are less prone to rely on such religious language but still ascribe its development to European expansion. See, e.g., *THE EXPANSION OF INTERNATIONAL SOCIETY* 2 (Hedley Bull & Adam Watson eds., Clarendon Press 1984).

international law.⁷ This emphasis on the state as the dominant (if not the only) actor in the international legal system has been both cause and result of a notion of international law dependent upon institutions that did not exist prior to modern times, or even until the later Twentieth Century. As Nussbaum noted, "[a] distinct concept of the law of nations as a law prevailing among independent states has emerged from earlier vague notions only during the last few centuries."⁸ The juristic use of "law" and "states" had yet to evolve.⁹

The concept of international law, of course, need not be seen only through the narrowed lenses of institutional positivism or academic essentialism. Some of the most interesting recent theory in international law has been the comparative examination of international norms developed and enforced outside of the Westphalian model.¹⁰ Despite its antecedents,¹¹ the comparative study of international law, particularly of the history of international law, remains a nascent field, its methodology still evolving and embracing wider fields of scholarship.¹² Of these, one of the most significant is the restoration to international law scholarship of history as a

7. "The necessity of a Law of Nations did not arise until a multitude of States independent of one another had successfully established themselves." OPPENHEIM, *supra* note 6, at 54. For Oppenheim, the genesis of the law of nations was Grotian. *Id.* at 54-85. That view, though, was challenged quickly, albeit not from a classical view but from other early modern views, which rightly argued for stronger antecedents in the writing of Vitoria. See, e.g., 1 JAMES B. SCOTT, *THE SPANISH ORIGIN OF INTERNATIONAL LAW*, FRANCISCO DE VITORIA AND HIS LAW OF NATIONS (Clarendon Press 1934).

8. ARTHUR NUSSBAUM, *A CONCISE HISTORY OF LAW OF NATIONS* ix (Macmillan rev. ed. 1954) [hereinafter NUSSBAUM, *HISTORY* (rev'd)]. See also GEORGE A. FINCH, *THE SOURCES OF MODERN INTERNATIONAL LAW* 1 (Carnegie Endowment for International Peace 1937).

9. Even so, Nussbaum continued and noted that a more extensive inquiry required the study of "[i]nterrelations of the most diverse human groups bearing some resemblance to states and, on the other hand, norms of a purely religious character." NUSSBAUM, *HISTORY* (rev'd), *supra* note 8, at ix.

10. See, e.g., Onuma Yasuaki, *When Was the Law of International Society Born?—An Inquiry of the History of International Law from an Intercivilizational Perspective*, 2 J. HIST. INT'L L. 1 (2000).

11. See, e.g., HENRY SUMNER MAINE, *INTERNATIONAL LAW: A SERIES OF LECTURES DELIVERED BEFORE THE UNIVERSITY OF CAMBRIDGE 1887* (J. Murray 2d ed. 1894). Nussbaum gives a nice, if necessarily sparse, historiography of international law to mid-century. See NUSSBAUM, *HISTORY*, *supra* note 3, at 293-98.

12. For an argument that comparative approaches are essential to the history of international law, see Ingo J. Hueck, *The Discipline of the History of International Law—New Trends and Methods on the History of International Law*, 3 J. HIST. INT'L L. 194, 217 (2001). The comparative study of international law has had a wider influence than history alone. A significant thread, occasioned by the influence of competing religions, has been much advanced by the studies recently revised by Mark Janis. See *RELIGION AND INTERNATIONAL LAW* (Mark W. Janis & Carolyn Evans eds., Brill Academic Publishers 2004).

discipline¹³—particularly ancient history—a movement led in the United States predominately by David Bederman.¹⁴

And a restoration it is. One aspect of the study of international law within the limits described above is that the focus on the contemporary state is in fact of rather recent vintage. Commentators from Grotius to Kent saw nothing amiss in basing their arguments on ancient sources.¹⁵ Early modern writers considered the law of nations to be a general, if not a universal, aspect of law.¹⁶ Indeed, one of the most extended discussions of international law in the ancient world was not completed until the early Twentieth Century.¹⁷ Still, the law of war remains, in most contemporary

13. For this practice in Germany, see Hueck, *supra* note 12. See also Olga V. Butkevych, *History of Ancient International Law: Challenges and Prospects*, 5 J. HIST. INT'L L. 189 (2003). For more general discussions, see Onuma Yasuaki, *The Birth of International Law as the Law of International Society*, 94 AM. SOC'Y INT'L L. PROC. 44 (2000).

14. There are, obviously, other candidates for the vein of this charge, but Bederman's work has been particularly significant. See, e.g., DAVID J. BEDERMAN, *INTERNATIONAL LAW IN ANTIQUITY* (Cambridge University Press 2001) [hereinafter BEDERMAN, ANTIQUITY]. Other texts have shown a renewed emphasis on the study of the origins of international relations. For a careful study of international order, reflecting the work of classicists such as W. Kendrick Pritchett, see *INTERNATIONAL RELATIONS IN POLITICAL THOUGHT: TEXTS FROM THE ANCIENT GREEKS TO THE FIRST WORLD WAR* (Chris Brown et al. eds., Cambridge University Press 2002).

15. On Grotius, see A NORMATIVE APPROACH TO WAR: PEACE, WAR, AND JUSTICE IN HUGO GROTIUS (Onuma Yasuaki ed., Clarendon Press 1993); David J. Bederman, *Reception of the Classical Tradition in International Law: Grotius' De Jure Belli Ac Pacis*, 10 EMORY INT'L L. REV. 1 (1996). For use of the ancients by pre-Grotian writers, see, e.g., Cornelius F. Murphy, Jr., *The Grotian Vision of World Order*, 76 AM. J. INT'L L. 477 (1982). On Kent, see John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 570 n.115 (1993). See also JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 49 (William Kent 6th ed. 1848). Interesting to our current purpose, Kent did not consider the law of ancient Greece to be international law in the fullest sense so long as it was based on the consent of the cities alone. Rather, he saw it as only developing once the Amphictyonic Council was established to instill ongoing order. *Id.* at 5. See, however, note 27 *infra*.

16. Montesquieu is both typical and influential:

The law of nations is naturally founded on this principle, that different nations ought in time of peace to do one another all the good they can, and in time of war as little injury as possible, without prejudicing their real interests.

The object of war is victory; that of victory is conquest; and that of conquest preservation. From this and the preceding principle all those rules are derived which constitute the law of nations.

All countries have a law of nations, not excepting the Iroquois themselves, though they devour their prisoners: for they send and receive ambassadors, and understand the rights of war and peace. The mischief is that their law of nations is not founded on true principles.

BARON DE MONTESQUIEU, 1 THE SPIRIT OF LAWS 2-3 (Thomas Nugent trans., Colonial Press 1900).

17. See 1, 2 COLEMAN PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* (Macmillan 1911).

studies, a wholly contemporary exercise; usually beginning in the era of Francis Lieber.¹⁸ This field, too, has begun to return to its roots.¹⁹

II. ANCIENT GREECE AND INTERNATIONAL LAW

With such a preface, returning to the "modern ring" of Thucydides provides reason for excitement as well as caution. Legal history is never without the danger of anachronism. The subtle tugs of contemporary thought and concerns must be carefully directed in a study of different times and cultures, not only to assess the past more accurately but also to inform the present more usefully. We can usefully ask modern questions and even apply current modes of analysis, but we must recognize that there will likely be an imperfect fit between the questions of the present and the answers of the past.

There are obvious reasons why the intermunicipal relations in ancient Greece differ from interstate relations in the modern world. The similarities, though, are too profound to be ignored. One might speculate that they result from a rough ancestry, that the modern international law is descended from the Roman *jus gentium*, itself modeled in part on Greek legal antecedents. I suspect that this extended line of causation is too weak to bear much weight in the light of historical rigor. Rather, the similarities appear to me to result from something more fundamental. Although the question is far afield from this Essay, it may be that some of these similarities result from practical necessity, some from contingent similarities between cultures, some from recurrent expression of core human values, and some, indeed, from the knowing repetition of past acts.

The exploration in this Essay, however, is not so broad as to answer such questions. It is not even so broad as to delineate the conduct of the Greek states in the fourth century B.C.E., a task essential to defining the causes of these parallels. Rather, it seeks to put forth one ancient writer's perspective on what we might discern, for our contemporary purposes, as the significance of the acts and

18. On Lieber, see Steve Sheppard, *Guerilla Parties, the Lieber Code, and the Law of War*, in FRANCIS LIEBER, *INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES* (forthcoming 2005) (on file with the author). One of the more influential collections of materials on the law of war commences with a near contemporary pronouncement, the Paris Declaration of 1856 Respecting Maritime Law. See *DOCUMENTS ON THE LAWS OF WAR* 47-52 (Adam Roberts & Rich Guelff eds., Oxford University Press 3d ed. 2000).

19. The best of the new studies in general is the collection of essays by Howard, Andreopoulos, and Shulman. See *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* (Michael Howard et al. eds., Yale University Press 1994).

ideas depicted. Specifically, this Essay seeks to examine more closely the practices Thucydides depicted of diplomacy, treaty, alliance, arbitration, and conduct in war, which may illuminate the reasoning and technique so resonant to the modern ear. Among the questions of this significance, it is reasonable to ask whether we can discern in the text obligations or institutions that are meaningfully similar to a law of war.

III. THUCYDIDES AND THE REALIST DISTRACTION

For some readers, it may be a surprise to ask such questions of Thucydides. *Peloponnesian War* has long been a banner for the legions of realists in international relations who argue that there are not, in fact, any obligations upon states (if not upon warriors) that correspond to a law of war. Much of this argument rests on his purported transcript of the Athenian envoys to Melos in the sixteenth year of the war, or 416 B.C.E., in which the Athenians made clear they were basing their argument on power rather than justice:

For ourselves, we shall not trouble you with specious pretenses—either of how we have a right to our empire because we overthrew the Mede, or are now attacking you because of wrong that you have done us—and make a long speech which would not be believed; and in return we hope that you, instead of thinking to influence us by saying that you did not join the Spartans, although their colonists, or that you have done us no wrong, will aim at what is feasible, holding in view the real sentiments of us both; since you know as well as we do that right, as the world goes, is only in question between equals in powers, while the strong do what they can and the weak suffer what they must.²⁰

From such lines comes Thucydides' place in international relations literature as the grandfather of realism, whether seen as raw

20. THUCYDIDES, *PELOPONNESIAN WAR*, 5.89, reprinted in *THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR* 352 (Robert B. Strassler ed., Richard Crawley trans., Free Press 1996) [hereinafter PW, and cited according to the convention for this text of notation to book, chapter, and line, unless the reference is to the Strassler text, which will be noted as STRASSLER, LANDMARK]. Crawley's translation, as modified either by Strassler or myself, is used throughout this article, and it is available in many editions, most usefully at <http://classics.mit.edu/Thucydides/pelopwar.html> (last visited Mar. 5, 2005), which is based on THUCYDIDES, *THE PELOPONNESIAN WAR* (E.P. Dutton ed., 1910).

power politics or the depiction of international anarchy, a distinction of significance to realists.²¹ Even so, the unexamined depiction of Thucydides as a realist is in decline.²² While this depiction has some appropriate vitality, his "realist" passages, such as the Melian dialogue, must be tempered with his presentation of conflicting views of the role of power, justice, and law, such as the passages in the speeches of Pericles and even Nicias.²³ Moreover, there is no inherent foundation for barring an idea of a law of war from a realist position, if realism is to be considered as something more than a mere contest for economic or military superiority. A state may act from political interests, including its interest in its reputation as law-abiding, humane, just, or even reliable. These interests recur throughout *Peloponnesian War*.

The realist depiction of Thucydides cannot answer whether there is evidence in his work of a concept of a law of war. There is much more to examine before we can discern whether Thucydides depicts obligations or institutions that are meaningfully similar to a law of war, or what reasons there may be for them.

IV. SEARCHING FOR THE LAW OF WAR IN THUCYDIDES

To consider the law of war in Thucydides is to examine the text through two lenses. The first is an awareness of the obligations

21. Daniel Garst, *Thucydides and Neorealism*, 33 INT'L. STUD. Q. 3 (1989). In its broader aspects, this concept of realism is usually and rightly presented with its Thucydidean roots, although this may have the unintended effect of placing Thucydides in theoretical opposition to other bases of international law. See, e.g., Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1402 (1998).

22. See, e.g., MARK V. KAUPPI & PAUL R. VIOTTI, *THE GLOBAL PHILOSOPHERS: WORLD POLITICS IN WESTERN THOUGHT* 50 (Lexington Books 1992).

23. On this point, see Laurie M. Johnson Bagby, *The Use and Abuse of Thucydides in International Relations*, 48 INT. ORG. 131 (1994). Bagby criticizes the bald designation of Thucydides as a "realist" in international relations, asserting Thucydides' emphasis on national character, the character of leaders, and the moral arguments of Hellenistic political rhetoric support a stronger claim for Thucydides' moral argument for city action than realists acknowledge in their depictions of his inter-municipal relations. Most importantly, Bagby illustrates the notion that what Thucydides wrote of the Athenian arguments about their own actions is not dispositive of Thucydides' view of their affairs. *Id.* at 137-39. The Periclean appeal to personal honor and virtue that Thucydides reports is a more telling argument that Thucydides may value virtue above interest alone. See PW, *supra* note 20, 2.35.1-2.46.2, discussed further in the text *infra* note 31. As to Nicias, there are two distinct interpretations of his great speech against the invasion of Sicily, in itself an inventory of the interests of Athens that would be harmed by the expedition. The first is a clear-eyed, realist appraisal of a bad idea. The second is an argument for peace, supported by interest. See PW, *supra* note 20, 6.9.1-6.14.1. Thucydides' own views on the law of the Greeks are considered further in the text accompanying notes 53-61, *infra*.

and institutions of the modern laws of war. The second is to consider what actions and motives Thucydides depicts that might represent an ancient understanding of obligations or institutions governing the city or the warrior.

At its most elemental, a law of war, if one is to be found in Thucydides or anywhere else, must at least be a broadly understood concept of rules by which the actors—a state and its warriors—are under obligations to restrain from certain types of conduct. At this breadth of definition, these obligations take three forms: obligations upon states in specific circumstances that might start a conflict, obligations binding warriors to keep them from certain acts while engaging in battle, and obligations on both states and warriors in managing military circumstances less than battles, such as occupations or keeping prisoners. Generally, the first obligations, restraints from war, are now called the *jus ad bellum*, and the second and third the *jus in bello*, although many topics blur this distinction.²⁴ An inquiry into obligations resonant of the laws of war may fruitfully consider obligations of these two types.

Yet obligations, particularly those that can be reduced to rules or specific laws, are but one aspect of the law of war, as they are of international law more broadly. As Oscar Schachter has rightly said, "international law is more appropriately viewed as an institution than as a set of rules."²⁵ For most modern lawyers reading Thucydides to find a law of war that might vaguely be considered a legal system, there must be some form of institutional framework for the recognition, adjudication, and change of the actors' obligations.²⁶

24. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 18, at 1–2. Despite the scholastic tenor of the terms and their explanatory power, the terms *jus in bello* and *jus ad bellum* are Twentieth Century neologisms, coined apparently in the 1930s, perhaps by the Viennese scholar of international law Josef Kunz. See Robert Kolb, *Origin of the Twin Terms Jus ad Bellum/Jus in Bello*, 320 INT'L REV. RED CROSS 553 (1997). My thanks to George Fletcher for pointing me to this reference. Of course, one reason why it would be unexpected to find earlier parallelism between the terms for law on the battlefield and law governing the commencement of hostilities is that the legal framework for the two ideas was hardly parallel. While institutional means existed for recognizing the rules of each and adjudicating claims for their breach, only in the twentieth century were these merged into common institutions.

25. Oscar Schachter, *The Nature and Process of Legal Development in International Society*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE, AND THEORY 745, 746 (Ronald St. J. Macdonald & Douglas M. Johnston eds., Martinus Nijhoff 1983).

26. This is, obviously, the Hartian concept of law. See H.L.A. HART, THE CONCEPT OF LAW (Oxford University Press 2d ed. 1994). The breadth of positivism I intend here does not, however, require that the institutions be based on a single rule of recognition, or on legislation, or on paper transactions, only that the mechanisms of such institutions be ongoing and discernable. This would suggest that such institutions are less central examples of a legal

The search for evidence of a nascent law of war can then be considered to have three strains: a set of obligations corresponding to *jus ad bellum*, a set of obligations corresponding to *jus in bello*, and some institutional frameworks for the recognition and adjudication of these obligations. Taking our cue from Professor Schachter, the institutional framework is essential regardless of what rules exist, and so the search commences with that strain.

V. INSTITUTIONS FOR THE RECOGNITION AND ADJUDICATION OF THE WARRIOR'S OBLIGATIONS

The independent city-states of Fourth- and Fifth Century Greece had no permanent association or tribunal to which all belonged and which was invested with permanent authority to declare the law or resolve disputes. Still, there were several practices—in which the city-states had a deep investment and to which their individual claims or immediate interests were subordinate—that persisted sufficiently over time for these practices to be considered legal institutions, at least in a weak form. Such practices included consultation with the oracle of Delphi, the use of neutral states as arbitrators, and the constitutional expectations of municipal decisions based on a pan-Hellenic ideal of law. The practice that was most clearly independent of the cities was the authority of the oracle at Delphi. Protected by an amphictyony, or religious league, of fourteen cities, Delphi was freely consulted by all cities, and its declarations were considered to be both disinterested and dispositive on matters of war and peace.²⁷

Thucydides records frequent contact between the cities and Delphi. The custom of free access to Delphi was specifically enshrined as the first term in the Athenian-Spartan armistice of 423.²⁸

The nature of consultations included political questions as well as arbitrations of interstate relations. When, for example, the Epidamnian colonists realized they would not be protected by their founders in Corcyra, they consulted the Delphic oracle, and followed

system, which is probably correct.

27. There were many amphictyonies in classical Greece, dedicated to the service of temples of many Gods. The Delphic Amphictyonic Council is merely the best known. On the practice generally, and how it related to the treaty process, see BEDERMAN, *ANTIQUITY*, *supra* note 14, at 168–71. On the inter-relationship between the religious and legal in the amphictyonies, see 2 PHILLIPSON, *supra* note 17, at 3–11.

28. PW, *supra* note 20, 4.118.1.

her answer to seek the protection of Corinth.²⁹ The oracle's commands were also followed in interstate relations, and even in military matters by the great powers. In 421, Thucydides notes that Athens, "moved by her misfortunes in the field and by the commands of the god at Delphi," returned the Delians, whom it had expelled from their city the year before, to their city.³⁰ Uncharacteristically, Thucydides does not make clear at that point in the text what misfortunes he means, particularly as Athens had just then won a victory against Scione.³¹ The Spartans also consulted Delphi, as in 426, when Sparta, wanting such a basis rather badly, at least officially based its decision to colonize Heraclea on a Delphic answer.³²

In both instances, Thucydides took care—in the case of the Delians perhaps extraordinary care—to demonstrate that the supplicant's interests or preferences coincided with the oracle's answer, and it is tempting to dismiss these Delphic pronouncements as either good politics or weak law. Yet Thucydides quite famously sought to diminish his reliance on divine causes, a goal that in itself may explain his balance between reliance on interests and narrative of divine arbitration in these passages' narrative. Nearly all the opposing parties invoked arbitration throughout the war. Each side usually acknowledged the other's right to its arbitration, even if the number of successful arbitrations that Thucydides records is not as great as those that failed. A city's right to arbitration was apparently customary, an aspect of the pan-Hellenic law, but it was also enshrined in treaties and truces. The law forbade the treatment of a claimant to arbitration as a malefactor.³³ By custom, arbitration could take the form either of referral to a third party or trial by battle.³⁴

Thucydides expends considerable effort in setting the stage for the first conflict between Athens and Sparta, which depended on two separate failures by states to secure claims for arbitration. In the growing dispute in 435 between Corcyra and Corinth over Epidamnus (which was then under a blockade), each side offered to refer the dispute to arbitration at Delphi, if the other would withdraw

29. *Id.* 1.25.

30. *Id.* 5.32.1. The expulsion of the Delians to Atramyrium in Asia minor had been for presumed religious impurity and is described at *id.* 5.1.1.

31. *Id.* 5.33.1.

32. *Id.* 3.92.5.

33. *Id.* 1.85.2. Bederman notes, though, that while the oracle was often consulted as an arbitrator, the oracle was not very good at it. See BEDERMAN, *ANTIQUITY*, *supra* note 14, at 83.

34. PW, *supra* note 20, 5.41.

troops already in place. Neither side did so, and Corinth declared war.³⁵ This episode became a significant part of the Corcyraean complaint against Corinth to other cities, particularly to Athens at a conference in 433. "[T]hat Corinth was injuring us is clear. Invited to refer the dispute about Epidamnus to arbitration, they chose to prosecute their complaints by war rather than by a fair trial."³⁶ This charge stung enough that the Corinthians went to some lengths to attempt to refute it.³⁷ At the close of the conference, Thucydides tells us there were two assemblies, the second of which resolved to enter into a defensive alliance of mutual assistance with the Corcyraeans.³⁸ This alliance was a definite step toward war between the two great powers, Athens and Sparta, both of which had strong relations with Corinth. War between Corinth and Corcyra broke out soon after, with Corinth's advance checked by Athenian intervention.³⁹

Corinth then petitioned Sparta, along with other members of the Lacedaemonian League, to counter the growing Athenian influence and to declare Athens in violation of its treaty with Sparta. Athenian representatives at the Lacedaemonian conference also called for arbitration, basing their claim on interest, oaths in the old treaties, and the witness to those oaths by the gods.⁴⁰ The Spartan king

35. *Id.* 1.28-1.29.

36. *Id.* 1.34.3.

37. The narrative is extensive but interesting in its approach. Effectively, the Corinthians argued (if self-servingly leaving out their own indiscretion) that the Corcyraean request for arbitration was in bad faith.

[1] As to their allegation that they wished the question to be first submitted to arbitration, it is obvious that a challenge coming from the party who is safe in a commanding position cannot gain the credit due only to him who, before appealing to arms, in deeds as well as words, places himself on a level with his adversary. [2] In their case, it was not before they laid siege to the place, but after they at length understood that we should not tamely suffer it, that they thought of the specious word arbitration. And not satisfied with their own misconduct there, they appear here now requiring you to join with them not in alliance, but in crime, and to receive them in spite of their being at enmity with us. [3] But it was when they stood firmest that they should have made overtures to you, and not at a time when we have been wronged and they are in peril; nor yet at a time when you will be admitting to a share in your protection those who never admitted you to a share in their power, and will be incurring an equal amount of blame from us with those in whose offences you had no hand. No, they should have shared their power with you before they asked you to share your fortunes with them.

Id. 1.39.1-1.39.3.

38. *Id.* 1.44-1.45. Of course, the Athenian decision to ally with Corcyra was not, itself, an adjudication of the arbitration offered between it and Corinth. That arbitration never occurred.

39. *See id.* 1.46-1.66.

40. *Id.* 1.78.4.

Archidamus, to whom Thucydides attributed a "reputation of being at once a wise and a moderate man,"⁴¹ maintained that Sparta should wait for arbitration, albeit using the time for quite practical ends:

As for the Athenians, send to them on the matter of Potidaea, send on the matter of the alleged wrongs of the allies, particularly as they are prepared to submit matters to arbitration, for one should not proceed against a party who offers arbitration as one would against a wrongdoer. Meanwhile do not omit preparation for war. This decision will be the best for yourselves and the most terrible to your opponents.⁴²

Archidamus, however, did not prevail with his people, who voted to declare the treaty broken and for war, thereby refusing the offer to arbitrate.⁴³

It would be hasty to conclude from these episodes that arbitration was disfavored among city leaders, voluntary rather than binding, uncommon, or disfavored in general by Thucydides. On the contrary, Thucydides had good reason to emphasize lost opportunities in the lengthy speeches favoring these arbitrations. Their failure sparked the war between the Peloponnese and the Athenians that "went on for a very long time," and during which Athens and the Hellenes suffered "disasters of a kind and number that no other similar period of time could match."⁴⁴ There are, to be certain, other instances in which one side refused to arbitrate a dispute, but most are condemned in one manner or another.

In 413, very near the middle of both the war and his narrative, Thucydides revisited the Spartans' refusal to arbitrate their claims against the Athenians, prompting the war. Even as the Spartans prepared to invade in the by-then second war, Thucydides believed they took heart from having a more just cause than they had in the first war.

In the former war, they considered that the offense had been more on their own side, both on account of the attack of the Thebans on Plataea in time of peace, and also of their own refusal to listen to the Athenian offer of arbitration, in spite of the clause in the former treaty

41. *Id.* 1.79.2.

42. *Id.* 1.85.2.

43. *Id.* 1.87.3.

44. *Id.* 1.9.1.

that where arbitration should be offered there should be no appeal to arms. For this reason they thought that they deserved their misfortunes, and took to heart seriously the disaster at Pylos and whatever else had befallen them.⁴⁵

In the second war, the Spartans believed they should prevail, because the Athenians were guilty of the offense for which the Spartans had already been punished.

When upon every dispute that arose as to the interpretation of any doubtful point in the treaty, their own offers of arbitration were always rejected by the Athenians—the Spartans at length decided that Athens had now committed the very same offense as they had before done, and had become the guilty party; and they began to be full of enthusiasm for the war.⁴⁶

Thucydides reports another arbitration that was unsuccessful, owing in that case to the belief by one side that the arbitrators had been biased.⁴⁷ In fact, the record for Thucydides is harsher toward arbitration than that available to Herodotus or later chroniclers,⁴⁸ for all of his apparent commitment to the right to an arbitral hearing.⁴⁹

The constitutional expectations of municipal decisions were based on a pan-Hellenic ideal of law. Of course, domestic laws settling private and commercial matters within the city-state were routinely applied among citizens, and although Athens had the most

45. *Id.* 7.18.2.

46. *Id.* 7.18.3. Athens had notably refused to arbitrate a dispute over the rebellion of Scione. *Id.* 4.122.4–4.122.5.

47. *Id.* 5.31. The Lepreans took the Eleans before the Lacaedemonians in a dispute over tribute, and the Lacaedemonians found for the Lepreans. The Eleans rejected the award, claiming Spartan bias, and invaded.

48. One favorite example occurs two centuries later. Aratos, the General of Sicyon and leader of the Achaean league, was fined for a breach of the custom of war. In 242, he led an attack on Argos, with which Sicyon was at peace, but where he had expected to spark a revolt against the tyrant Aristippos. The revolt never came, and Aratos retreated. Aristippos brought a charge against Aratos for breaching the peace, which was arbitrated by the Mantineans. The Mantineans granted Aristippos nominal damages of thirty minae. See Plutarch, *Aratos*, in *PLUTARCH, LIVES* (John Dryden trans., Arthur Hugh Clough ed., 1998); see also F.W. WALBANK, *ARATOS OF SICYON* 56 (Cambridge University Press 1933).

49. Several times, the right to arbitration is vindicated, even if an arbitral award is not. See, e.g., PW, *supra* note 20, 5.41, in which the Spartans recognized an Argive claim for arbitration. Phillipson illustrates twenty successful arbitrations, recorded largely in Herodotus or Plutarch. See 2 PHILLIPSON, *supra* note 17, at 138–65; see also MARCUS NIEBUHR TOD, *INTERNATIONAL ARBITRATION AMONGST THE GREEKS* (Clarendon Press 1913); DEREK ROEBUCK, *ANCIENT GREEK ARBITRATION* (Holo Books 2001).

crowded law courts and the most developed body of laws,⁵⁰ there was considerable agreement as to the gist of laws governing disputes across Hellas.⁵¹ That law, both statutory and customary, was believed by both Spartans and Athenians to be a matter for general obedience. Archidamus held the Spartans wise because “we are educated with too little learning to despise the laws, and with too severe a self-control to disobey them, and are brought up not to be too knowing in useless matters.”⁵² Likewise, Pericles praised Athenians whose relations among themselves were without fear owing to “our chief safeguard, teaching us to obey the magistrates and the laws, particularly such as regard the protection of the injured, whether they are actually on the statute book, or belong to that code which, although unwritten, yet cannot be broken without acknowledged disgrace.”⁵³

The question relevant to this Essay is not whether the Greeks had a reverence for law, but which ideas regarding law that governed the cities themselves prevailed. The answer is that the cities appear, at least to Thucydides, to be in the position of any other litigant before the pan-Hellenic law: a city could be found to violate the law and be fined or otherwise punished, just as could a general or private citizen. On that principle, in their disputes underlying their claims to arbitration, the Corinthians claimed rights under law against the Corcyraeans, and Thucydides appears to accept this claim as appropriate.⁵⁴ Likewise, the Plataeans, after their defeat in 527, in a tribunal they saw as failing to meet the procedural requirements of custom,⁵⁵ argued to the Spartans that they had freely surrendered to them and so should not be slaughtered under Hellenic law. This argument failed to convince the Spartans, whose Theban allies argued that the Plataeans did not deserve clemency for their surrender but rather trial, also under Hellenic law, for their prior offenses in killing

50. Indeed, Athens grew both rich and hated for its role as the Hellene courthouse. See PW, *supra* note 20, 1.77.1–1.77.4 (indignation), 6.91.7 (riches).

51. Most histories of Greek law are predominantly concerned with Athenian law, of which we tend to have much better records. For a general introduction, see JOHN WALTER JONES, *THE LAW AND LEGAL THEORY OF THE GREEKS: AN INTRODUCTION* (Clarendon Press 1956). Contemporary research is reflected in the essays of *THE LAW AND THE COURTS IN ANCIENT GREECE* (Edward M. Harris & Lene Rubinstein eds., Duckworth 2004), and for the purposes of this Essay, particular attention might be drawn to Angelos Chaniotis, *Justifying Territorial Claims in Classical and Hellenistic Greece: The Beginnings of International Law*, *in id.* at 185.

52. PW, *supra* note 20, 1.84.1.

53. *Id.* 2.37.3.

54. *Id.* 1.41.

55. *Id.* 3.53.1.

Theban youths during the battle of Coronea.⁵⁶ All sides understood the inviolability of temples in invaded lands, as well as the limited nature of rights over temples after a conquest.⁵⁷

One of Thucydides' most interesting passages on Hellenic law demonstrates the possibility of what modern theorists would call horizontal enforcement. An important pan-Hellenic law established a truce for participation in the Olympic games.⁵⁸ In 420, Elis unilaterally declared a fine of two thousand minae against Sparta for war against it during the truce, a fine the Spartans refused to pay. The Eleans, who were near Olympia and placed troops at the site of the games, barred the Spartans from attending.⁵⁹

The two aspects of pan-Hellenic law that powerfully affected intermunicipal relations and themselves served as institutional commitments were customs regarding treaties and envoys. In his history, Thucydides more than recounts the effects of treaties; he chronicles negotiations and offers to enter treaties in great detail. He presents the drafts and texts of treaties as often as he apparently could, and he presents the later arguments for compliance or breach in great detail as well.⁶⁰

Treaties were given great reverence, sometimes written in public, as in the inscription of the Argos-Athenian treaty in the agora of the Acropolis.⁶¹ Although the term *pacta sunt servanda* was not coined until much later,⁶² a strong custom honoring treaties existed. Treaties were significant for good reason: they quite often worked. Treaties upheld countless truces and alliances, and even the much-vaunted thirty-years' treaty between Athens and Sparta led to a truce lasting fourteen.⁶³

56. *Id.* 3.67.6. The battle of Coronea is mentioned in 1.113.2, although the slaughter of the youths is not particularly mentioned there.

57. *Id.* 4.97-4.98.

58. On violation of an Olympic truce, see *id.*

59. See *id.* 5.48-5.50.

60. See, e.g., *id.* 5.41, the proposal of the treaty between Argos and Sparta, and its adoption and text, *id.* 5.77-5.79, or the negotiations and drafts of the treaty in 412 between Sparta and Persia, *id.* 8.36-8.37, 8.57-8.58. Most notably, see the negotiations between Athens and Sparta for the fifty years' treaty and its text. *Id.* 5.17-5.19, 5.23.

61. *Id.* 5.47.11.

62. The term itself appears to have originated with Pufendorf. See SAMUEL F. VON PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* 3.4 (James Brown Scott ed., C. & W. Oldfather trans., Carnegie Endowment for International Peace 1934) (summary, Amsterdam 1688); Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 VA. J. INT'L L. 405 (1994).

63. PW, *supra* note 20, 1.155.1, 2.2.1.

The other requirement for pan-Hellenic cooperation that depended on its laws was the protection of envoys, or ambassadors, and heralds. These officers are a constant presence throughout the narrative.⁶⁴ As a rule, envoys and heralds were not harmed, but rather protected under the ancient religious obligations toward guests⁶⁵—as well as more specific but still long-standing customs for envoys, particularly heralds, who alone could travel safely in time of war.⁶⁶ Although these customs were occasionally reinforced by treaty,⁶⁷ Thucydides never mentions a treaty as a basis for the treatment of envoys.

In the main, diplomatic agents appear to have been left unmolested, either by their recipient city or by cities whose lands they traversed on their journeys. There were, of course, exceptions, which Thucydides notes. Athenians captured Persian envoys to Sparta⁶⁸ and killed both Spartan envoys and a Corinthian envoy to Persia.⁶⁹ Themistocles held envoys as hostages. Such breaches of immunity, however, were rare.

In sum, it would seem that Thucydides presents a variety of institutions that could recognize customary laws governing inter-municipal conduct. Each was relatively weak, and none was capable of long-standing enforcement of legal norms without the cooperation of at least some of the cities. This cooperation depended as much on political exigency as on a sense of legal obligation, yet Thucydides depicts generals, ephors, and the rest responding to such obligations, based on customs, some of which are greatly detailed.

It is fair to conclude that a weak institutional system of inter-municipal law existed and was capable of recognizing and adjudicating claims of a law of war. In the light of that conclusion, the questions then become whether there are rules of sufficient specificity of *jus ad bellum* and *jus in bello* to be meaningfully recognized and adjudicated by the institutions.

64. Strassler's index records seventy-nine mentions or descriptions of different diplomatic missions. STRASSLER, LANDMARK, *supra* note 20, at 659–60, 688. There are dozens more not indexed.

65. See GABRIEL HERMAN, *RITUALISED FRIENDSHIP AND THE GREEK CITY* 53 (Cambridge University Press 1987).

66. PW, *supra* note 20, 2.1. As to diplomatic immunity generally, see BEDERMAN, ANTIQUITY, *supra* note 17, at 110–14.

67. See BEDERMAN, ANTIQUITY, *supra* note 14, at 109 n.117 (construing rightly two treaties ensuring ambassadorial immunity as reflecting custom).

68. PW, *supra* note 20, 4.50.3.

69. *Id.* 2.67.

VI. OBLIGATIONS OF *JUS AD BELLUM*

Thucydides was greatly concerned with the arguments offered for war, and the majority of the speeches he reproduced or invented concerned grounds for war.⁷⁰ While his arguments included a considerable breadth of economic and political interests,⁷¹ they also turned on causes that both reflected those interests and stood alone. The law presumed peace, which could be broken only for an acceptable cause, although causes were not difficult to assign in most cases. The most common cause was probably self-defense,⁷² but there were also interference with a right established by custom or treaty,⁷³ violation of a duty by a colony to a parent city,⁷⁴ and interference with an ally.⁷⁵

Other aspects of an elemental *jus ad bellum* are also discernable. Neutrality was, with some famous exceptions, recognized and respected. Although the fate of the Melians made clear that at least the Athenians did not regard respect for neutrals as an unbreakable obligation,⁷⁶ in other circumstances, neutrality was sufficiently upheld by the combatants to demonstrate a custom of its respect.⁷⁷

70. The debate and twenty-six political speeches in Thucydides have been carefully studied for millennia. For interesting recent studies along the lines above, see CLIFFORD ORWIN, *THE HUMANITY OF THUCYDIDES* 30: 63 (Princeton University Press 1994), and a new consideration of the classic argument that Thucydides' narrative is one of *stasis* and *kinesis*, in which (among other things) war destroyed peace, in JONATHAN J. PRICE, *THUCYDIDES AND INTERNAL WAR* (Cambridge University Press 2001).

71. As to the fundamental interests at work in the war, I think it best merely to endorse a marvelous study of the competing reasons in Thucydides and his commentators, that despite red herrings and alternatives, Thucydides truly believed that the truest cause was Spartan fear of domination by Athens. See GEORGE CAWKWELL, *THUCYDIDES AND THE PELOPONNESIAN WAR* 20–39 (Routledge 1997). That argument did not, however, exclude the legal obligation to aid her allies. See CHRISTOPHER PELLING, *LITERARY TEXTS AND THE GREEK HISTORIAN* 87–90 (Routledge 2000).

72. See *supra* note 46 and accompanying text (concerning the Spartan arguments against Athens).

73. See, e.g., PW, *supra* note 20, 1.67.1 (stating that the Megarians complained of being barred from Athenian ports in violation of their treaty).

74. See, e.g., *id.* 1.15.4 (describing Corinthian complaints against Corcyraeans' failure to give honor to the mother country).

75. See *supra* notes 38–39 and accompanying text (concerning Athenian support of the Corcyraeans).

76. See *supra* note 20 and accompanying text (concerning Athenian argument at Melos).

77. See PW, *supra* note 20, 7.33.2, 7.50.1, 7.58.1 (discussing Agrigentum's neutrality, which required it to drive out its Spartan faction); see also *id.* 2.9.2 (dealing with Argos), 6.88.1–6.88.2 (dealing with Camarina).

VII. OBLIGATIONS OF *JUS IN BELLO*

In many ways, modern historians and military theorists seem either surprised or appalled by the degree to which Greek warfare was bounded by customs that constrained battles to certain seasons and tactics, and turned such battles into duels between warriors.⁷⁸ The Greeks, at least in battle with one another, were restrained by a variety of customs in their battle strategies, tactics, and conduct.⁷⁹ Some battle customs of the Greek hoplites form a foundation for the rest of the battlefield, in which heavily armed soldiers in similar formations face one another, cavalry, and missile-launching light troops, fighting until one army retreats.⁸⁰ Beyond the moments of actual combat, however, Thucydides relates many further customs.

The most notable is the nearly uniform respect for a truce, granted by the victor to allow the vanquished either to retrieve its dead or to receive them from the victor's soldiers.⁸¹ This respect was so great and the practice so essential that Thucydides notes specially two occasions when the losing side fled without requesting this right.⁸² Another custom following battle concerned the trophy, a physical monument erected by the victorious army or fleet on or near the battlefield.⁸³ Thucydides recounts dozens of trophies,⁸⁴ including several in which both sides claimed victory and erected their own.⁸⁵

78. See, e.g., VICTOR DAVIS HANSON, *THE WESTERN WAY OF WAR: INFANTRY BATTLE IN CLASSICAL GREECE* 9–18 (Oxford University Press 1990).

79. The most exhaustive study of the customs of Greek warfare is undoubtedly the monumental study by Pritchett, little of which will be restated here. See 1–5 W. KENDRICK PRITCHETT, *THE GREEK STATE AT WAR* (University of California Press 1971–1991).

80. The most detailed description is of the battle of Mantinea in 418. PW, *supra* note 20, 4.73.4–5.69.1.

81. See, e.g., *id.* 1.63.3 (Athenians return dead to Potideans under truce at Chalcidice, 432), 2.92.4 (Athenians return dead under truce to Spartans at Naupactus, 429), 3.109 (Athenians give truce to Spartans to recover dead at Amphilocia, 426), 6.103.1 (Athenians return Syracusan dead under truce at Syracuse, 414), 7.45.1 (Syracusans give truce to Athenians to recover their dead at Syracuse, 413), 8.106.4 (Athens returns Spartan dead under truce at Hellespont, 411). There are more examples throughout the narrative.

82. See *id.* 3.113.5. (Ambraciots forget to ask Athenians at Amphilocia, 426), 7.72.2–7.75.3 (Athenians too demoralized to ask Syracusans at Syracuse, 413).

83. The Greek trophy has attracted considerable scholarly attention, but the best commentary remains Pritchett's. See PRITCHETT, *supra* note 79, at 246–75.

84. STRASSLER, *LANDMARK*, *supra*, note 20, at 704 (indexing forty-nine trophies); PRITCHETT, *supra* note 79, at 270 (counting fifty-eight trophies).

85. Thucydides recorded this happening five times. See PW, *supra* note 20, 1.54 (Corinth and Corcyra at Sybota, 433), 2.92.4–2.92.5 (Athens and Sparta at Naupactus, 429), 4.134 (Mantineia and Tegea at Laodocian, 423), 7.54 (Syracuse and Athens at Syracuse, 414), 1.105.6 (Athens erected a trophy for a victory over Corinth at Poteidaia, but the Corinthians erected another one twelve days later).

The fascinating aspect of this practice is that the losing side did not violate the victor's trophy. The strength of the custom is particularly apparent when one considers that the victors often left the field after brief control of it, while the vanquished remained subjugated but, if alive, nearby.

Other aspects of combat and its aftermath were not much regulated. Weapons, while subject to the custom of hoplite combat already mentioned, were otherwise subject to few rules. While missiles had once been outlawed by agreement, peltasts, or javelineers, had become accepted on the battlefield. Greek fire, the poisoning of wells, and the use of corpses to weaken besieged populations were employed.⁸⁶

Neutrality during battle was respected, though, as it was in war. Temples, priests, and athletes en route to competition were given protection by all.⁸⁷ What to a modern eye seems shocking is that such protections were not extended to women or to children, who were usually enslaved following the capitulation of a city.⁸⁸ Further, soldiers routinely destroyed food supplies, further imperiling noncombatants.⁸⁹ Lastly, prisoners were routinely enslaved and often executed,⁹⁰ although the law distinguished between prisoners who had surrendered (and were not to be killed) from those who were captured (and so could be).⁹¹ Most prisoners, however, were kept as slaves, sometimes sold⁹² and sometimes returned at an armistice or truce.⁹³

This brief selection of some central aspects of the Greek *jus in bello* is hardly exhaustive of the field. Again, it is not intended to do

86. See, e.g., *id.* 4.100.1–4.100.5 (describing Boeotians' use of flame-device to capture Delium); ADRIENNE MAYOR, GREEK FIRE, POISON ARROWS, AND SCORPION BOMBS: BIOLOGICAL AND CHEMICAL WARFARE IN THE ANCIENT WORLD (Duckworth 2003).

87. See PW, *supra*, note 20, 4.118.1, 4.97 (concerning temples, particularly Delphi). The rule regarding athletes applied not only to Olympians, as we have seen, but also to individuals, with Demosthenes' escape from the Argives at Epidaurus serving as an example. *Id.* 5.80.3.

88. *Id.* 1.89.3, 5.3.4, 5.32.1, 5.116.4. However, at least one treaty, between Argos and Sparta, led to the restoration of children enslaved after combat. *Id.* 5.77.1–5.77.3.

89. The Peloponnesian strategy was to invade in time to destroy the crops in Attica. See, e.g., *id.* 2.19.2, 2.23.3, 2.47.2, 2.55.1, 2.57.2, 3.1.2, 3.26, 4.2.1, 7.19.1. The Athenians burned crops in Sicily. *Id.* 6.94.2–6.94.3. Cattle and beasts of burden were fair game as well. See *id.* 8.31.1.

90. *Id.* 1.108, 3.32.1.

91. See *supra* notes 55–57 and accompanying text.

92. Some seven thousand Athenians were held for two months in quarries before being sold by the Syracusans. PW, *supra* note 20, 7.87.2.

93. See, e.g., *id.* 4.38.1–4.41.1 (Cleon holds Spartan from Pylos at Athens), 5.3.1–5.3.4 (Chalcidians release seven hundred prisoners), 5.42.1 (Boeotians release Athenians).

more than illuminate certain aspects of Thucydides' narration of the war, in an effort to discern if there is sufficient evidence there to support rules for a law of war that would be necessary to support legal institutions. It is clear that, while the rules are heavily circumscribed, rules arising from custom were clear and followed, usually, by the warriors themselves.

VIII. THE RING OF MODERNITY

Thucydides does not appear to have intended to present a comprehensive and coherent view of the laws and customs of war. But in narrating the great war of his age, he does depict aspects of the laws and customs of war that, in the context of weak institutions of varying formality, support a claim that some form of a law of war existed among the cities of fourth century Greece.

This form of the law of war patently evolved without satisfying many of the preconditions we ordinarily associate with the modern law of war. Further, much of it was based not on treaty or statute, but on custom. While an analog between the modern state and the ancient city can be drawn, the absence of a system of states on a Eurocentric, post-Westphalian model does not seem to have prevented a weak case of a legal system from evolving, with sufficient institutional apparatus and a sufficiently comprehensive array of rules governing conduct.

Given this conclusion, it is perhaps fair to assert that a *prima facie* case has been made in Thucydides that not only the law of war but also international law existed in a meaningful way in the classical Greek world. If that case holds, several conclusions can be drawn from it. First, the differences between conditions ancient and modern allow for a comparative analysis that is not as easily drawn for this field from opposing national laws, when the law itself must have a pan-national character. Second, it would seem that the historical continuum of international law is not only a valid but also a useful aspect of its study.

This Essay has not explored fully the limits of the Greek laws of war, particularly their application (or inapplicability) to the armies of non-Greeks, nor has it offered a full rationale for the arguments that justified the rules and institutions, particularly the complicated inter-relationship between war and religion in Greek society, the problems of reciprocity, or the Hellene character. Still, in considering how a single text illuminates institutions and rules by which the Greeks brought some order to war, we might find reasons to believe

that our current conceptions of the law of war may be re-examined, and find that they, too, may apply in less formal circumstances than the contemporary model demands. That, perhaps, may turn out to be the modern ring one hears across two and a half millennia.